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Supreme Court, U.S.
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NO. ____ CAPITAL CASE

In The
Supreme Court of the United States

JAMES RANDALL ROGERS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the execution of Petitioner Rogers, who suffers from severe organic brain damage and significantly sub-average intelligence that interferes with his mental capacity and ability to function, who manifested impairments in adaptive behavior similar to those found in mentally retarded individuals during his development, and who was just 19 years and one month old at the time of the crime, would violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment right to equal protection.

(2) Whether the Georgia trial court denied Petitioner Rogers assistance of counsel in violation of *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006), and the Sixth Amendment when it refused to permit Rogers' chosen, *pro bono* counsel – the only counsel who was prepared – to argue critical pre-trial motions at his mental retardation hearing.

(3) Whether the Georgia trial court's use of civil trial procedures at Petitioner Rogers' mental retardation hearing, instead of the criminal procedures requisite to the continuation of Rogers' criminal trial, violated Rogers' rights to due process and equal protection.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed on the caption.

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The Georgia Supreme Court's opinion is published at *Rogers v. State*, 282 Ga. 659, 653 S.E.2d 31 (2007), and included in Appendix A, pages 1a – 16a. The Georgia trial court entered judgment on a jury verdict on September 19, 2005, without a published opinion. A prior Georgia Supreme Court opinion, holding that Petitioner Rogers was entitled to a jury trial on the issue of mental retardation, is published at *Rogers v. State*, 276 Ga. 67, 575 S.E.2d 879 (2003), and included in Appendix B, pages 17a – 25a.

JURISDICTION

On November 5, 2007, the Georgia Supreme Court issued its Order affirming the judgment that Petitioner Rogers is not mentally retarded. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the United States Constitution guarantees that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Amendment VIII to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the United States Constitution, section 1, provides, in relevant part:

> Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner James Randall Rogers seeks to appeal Georgia court rulings that he is not mentally retarded and thus can be subjected to capital punishment. The execution of Petitioner Rogers would constitute cruel and unusual punishment in contravention of the Eighth Amendment and violate his right to equal protection of the law in contravention of the Fourteenth Amendment, because (1) Rogers indisputably suffers from severe organic brain injury, brain dysfunction and sub-average intelligence, (2) Rogers manifested impairments in his adaptive behavior akin to those suffered by mentally retarded persons during his development, and (3) Rogers was only nineteen years and one month old at the time of the crime and demonstrated the same immaturity and impetuousness of juveniles just one year and one month younger than him.

Moreover, because the Georgia trial court deprived Petitioner Rogers of the assistance of counsel and denied him due process and equal protection by

treating the mental retardation proceedings as civil, instead of criminal, the verdict should be overturned.

Psychologists who evaluated Petitioner Rogers' neuropsychological functioning unanimously concluded that he suffered from organic brain injury and severe brain dysfunction. Dr. Robert H. Connell, who testified for the State, evaluated Petitioner Rogers in 1984, and diagnosed "mixed organic brain syndrome." On the Halstead-Reitan test administered by Dr. Connell, Petitioner Rogers' scores were within the pathological range on all but one measurement – indicating brain damage and dysfunction. Indeed, Rogers scored .9 out of 1.0 – the second highest score, with any score above .5 on the scale indicating overall brain dysfunction, and higher scores reflecting more severe damage and dysfunction. Dr. Connell also concluded that Petitioner Rogers had significantly sub-average intellectual functioning, that he was unable to readily process complex information, that he was confused and frustrated when stimulation came from multiple sources, and that he could be expected to be very impulsive.

Dr. Mark Zimmerman, who testified for Petitioner Rogers, evaluated him in 1994. Dr. Zimmerman used the Luria-Nebraska neuropsychological battery – another test that evaluates brain dysfunction. The results showed significant diffuse brain dysfunction in both sides of the brain, and in all areas where Rogers receives, processes and attempts to evaluate information. Dr. Connell agreed that the Luria-Nebraska test was another reliable measurement of brain dysfunction and that the results obtained by Dr.

Zimmerman were consistent with Dr. Connell's evaluation.

Although Petitioner Rogers' IQ scores have varied, all of his IQ scores have been consistent with significantly sub-average intellectual functioning. With 100 indicating the "average" IQ, Rogers' test scores have never come close:

Tester	Test	Score
Hark 1977	WAIS	80
Hark 1980	WAIS	84
Connell 1984	WAIS-R	85
Fisher 1995	WAIS-R	66
Zimmerman 1994	Stanford-Binet	68

Petitioner Rogers also manifested severe impairments in adaptive behavior during his developmental period. First, his school records demonstrate this impairment. From kindergarten through the time he dropped out of school in the seventh grade, his performance was abysmal. Despite excellent attendance during his early school years, his grades were typically "U," for "unsatisfactory." He even failed homeroom during the first two quarters of seventh grade, after which he permanently dropped out of school. He had difficulty getting along with others and a history of aggression toward his teachers during his limited time in school.

Second, Petitioner Rogers' very limited work record also evidences impairment in adaptive behavior. After dropping out of school, and before his incarceration for murder at the age of 19, he held two menial jobs. First, he worked moving spools from one place to

another at a cotton mill. Then, he shoveled asphalt for a construction company. Rogers only worked in each job for a short period of time because he could not do either well enough to stay employed.

Finally, Rogers also had a history of behavioral problems that indicated impairments in adaptive behavior and the ability to engage in logical reasoning. By age 16, Rogers had been detained at the Regional Youth Detention Center on three difference occasions and spent five months at the State Youth Detention Facility. In May 1977, at age 16, Rogers was sent to the Regional Youth Detention Center again, after he attempted to set fire to the city jail -- while he was incarcerated in it. Less than three years later, he committed the crime for which he was sentenced to death.

REASONS FOR GRANTING THE PETITION

I. The Execution Of Petitioner Rogers Would Violate The Eighth Amendment's Proscription Against Cruel And Unusual Punishment And His Fourteenth Amendment Right To Equal Protection.

The Eighth Amendment prohibits "[e]xcessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 31-121, 122 S. Ct.

2242, 2247 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590 (1958)).

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. *Thompson v. Oklahoma*, 487 U.S. 815, 856, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring in judgment). Accordingly, capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Atkins*, 536 U.S at 319, 122 S. Ct. 2242.

In *Atkins*, this Court noted that multiple deficiencies in the mental functioning of mentally retarded individuals diminish their personal culpability. *Id.* at 318, 122 S. Ct. at 2251. Those deficiencies include:

(a) diminished capacity to understand and process information;

(b) diminished capacity to communicate;

(c) diminished capacity to abstract from mistakes and learn from experience;

(d) diminished capacity to engage in logical reasoning;

(e) diminished capacity to control impulses;

(f) diminished capacity to understand the reactions of others; and

> (g) diminished capacity to act pursuant to a premeditated plan rather than acting on impulse.

Atkins, 536 U.S. at 317, 122 S. Ct. at 2250. These impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have any real deterrent effect on mentally retarded individuals. *Id.* at 319-20, 122 S. Ct. 2242. Thus, this Court held that capital punishment as applied to mentally retarded individuals violates the Eighth Amendment:

> Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we therefore conclude that such punishment is excessive and that the Constitution "places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

Id. at 321, 122 S. Ct. at 2252.

Likewise, in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), this Court held that the immaturity of juveniles diminishes their culpability and renders the execution of a juvenile for a crime committed before his or her eighteenth birthday cruel and unusual punishment in violation of the Eighth Amendment.

In *Roper*, this Court noted that three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot reliably be

classified among the worst offenders. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569, 125 S. Ct. at 1195 (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658 (1993)).

Second, juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure because they have less control, or less experience with control, over their own environment. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 102 S. Ct. 869 (1982)). Finally, the character of a juvenile is more transitory and not as well formed as that of an adult. *Id.* at 570, 125 S. Ct. 1195.

Because of these significant differences between juveniles and adults, this Court reasoned that any conclusion that a juvenile could be classified among the worst, or most culpable, offenders is suspect. Rather, the susceptibility of juveniles to immature and irresponsible behavior means that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* (quoting *Thompson*, 487 U.S. at 835, 108 S. Ct. 2687).

Petitioner Rogers was 19 years and one month old at the time of the crime. The evidence demonstrates Rogers' immaturity and impetuousness, consistent with the characteristics of juveniles just one year and one month younger than him. This Court, of course, recognized that the 18-year old threshold was

arbitrary, but the evidence here further demonstrates that Rogers suffered from diminished capacities that coincided with those of mentally retarded persons. Rogers' IQ scores were indisputably significantly sub-average, and he suffered from organic brain injury and severe brain dysfunction. Psychologist Robert Connell -- the State's witness at Rogers' mental retardation hearing -- testified that Rogers had:

> (a) a diminished capacity to understand and process information;
>
> (b) a diminished capacity to communicate in complex situations or when there are a lot of stimuli requiring quick interpretation and response;
>
> (c) a diminished capacity to abstract from mistakes and learn from experience;
>
> (d) a diminished capacity to engage in logical reasoning;
>
> (e) a diminished capacity to comprehend;
>
> (f) a diminished capacity to control his impulses; and
>
> (g) a diminished capacity to think things through rather than acting on impulse.

(T. 1864-68).

Because Petitioner Rogers had sub-average intelligence, suffered from similar diminished

capacities as mentally retarded individuals, demonstrated the same immaturity as juveniles, and manifested impairments in his adaptive behavior during his development, he – like juveniles and mentally retarded individuals – has diminished personal culpability. Thus, Rogers cannot be found to be one whose "extreme culpability" is the "most deserving of execution." To the contrary: the imposition of the death penalty on Petitioner Rogers would constitute cruel and unusual punishment in violation of the Eighth Amendment.

Moreover, because the State cannot constitutionally impose capital punishment on juveniles or on the mentally retarded, the imposition of the death penalty on Petitioner Rogers, who shares similarly diminished capacities, would violate his right to equal protection of the laws under the Fourteenth Amendment. The Equal Protection clause means, and is a guarantee, that all persons subjected to state legislation shall be treated alike, under like circumstances and conditions, both in privileges conferred and in liabilities imposed. *See, e.g., State of La. ex rel. Francis v. Resweber,* 329 U.S. 459, 465 67 S. Ct. 374 (1947). The execution of Rogers, who shares similar diminished capacities of those who are mentally retarded in light of the Constitutional prohibition against the execution of the mentally retarded would be a denial of the fundamental right to equal protection of the laws.

II. Petitioner Rogers Was Denied Assistance Of Counsel In Violation Of *United States v. Gonzales-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006), And The Sixth Amendment.

During Petitioner Rogers' pre-trial proceedings, the trial court, without warning or prior notice, flatly refused to permit Rogers' selected *pro bono* counsel – the only attorney who had prepared to argue multiple, complicated pre-trial motions regarding conflicts of interest and the qualifications of a purported expert for the State to present argument. Instead, the trial court required another attorney, without prior warning or notice, to argue the motions on Rogers' behalf. (Tr. at 757-58; 796-97).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." An important element includes "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 2561 (2006). There is no dispute that Rogers requested that the counsel who had prepared argument represent him. And there is no dispute that the trial court flatly, without prior notice that he would hear argument only from part of Rogers' defense team, refused to permit her to argue the motions on Rogers' behalf.

As this Court has explained:

> Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received.

Id., 126 S. Ct. at 2563. Said another way, "erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" *Id.*, 126 S. Ct. at 2564 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 282, 113 S. Ct. 2078 (1993)). Thus, where a defendant, like Petitioner Rogers, is denied the assistance of the counsel of his choosing, there is no need to demonstrate prejudice due to the deprivation. The deprivation itself constitutes a structural error in the trial, requiring reversal.

III. The Georgia Trial Court's Use Of Civil Jury Selection Procedures At Petitioner Rogers' Mental Retardation Hearing, In Lieu Of The Criminal Procedures Requisite To The Continuation Of Rogers' Criminal Trial, Violated Rogers' Due Process and Equal Protection Rights.

After Petitioner Rogers' conviction, Georgia enacted a statute that prohibits imposition of the death penalty for mentally retarded individuals. *See* O.C.G.A. § 17-

7-131(j). The Georgia Supreme Court, following the enactment of the statute, held that the execution of any mentally retarded individual, regardless of when the conviction occurred, violates the Georgia constitution's proscription against cruel and unusual punishments. *See Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (Ga. 1992). Thus, individuals who were convicted of a capital offense prior to the enactment of the Georgia statute have, like those convicted following the enactment of the statute, been permitted to raise the issue of mental retardation in regard to whether the death penalty can apply.

Georgia has developed procedures governing mental-retardation challenges to the imposition of the death penalty. Pursuant to these procedures, the mental retardation hearing is deemed to be a continuation of the guilt-innocence phase of the original trial. *See Fleming v. Zant*, 386 S.E.2d 339 (Ga. 1989), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (Ga. 1992); *Stephens v. State*, 509 S.E.2d 605, 609 (Ga. 1998) ("This procedure is designed to ensure that a defendant has 'essentially the same opportunity to litigate the issue of his mental retardation as he would have had if the case were tried today, with the benefit of the O.C.G.A. § 17-7-131(j) death-penalty exclusion.'"). As such, mental retardation hearings are *criminal* proceedings. To treat them otherwise, as the Georgia trial court below did in several key respects, is a denial of due process and equal protection, requiring reversal.

A. Rogers Was Not Permitted The Correct Number of Peremptory Challenges.

As this Court has noted, the right to exercise peremptory challenges is "one of the most important of the rights secured to the accused." *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). Indeed, "[t]he denial or impairment of the right is reversible error without a showing of prejudice." *Swain*, 380 U.S. at 219, 85 S. Ct. at 835. *See also Harrison v. United States*, 163 U.S. 140, 141, 16 S. Ct. 961 (1896) (noting that where the defendant had received only five peremptory challenges but the proper procedure provided ten, "five persons unlawfully took part as jurors in his conviction" and reversing the conviction); *Frazier v. United States*, 335 U.S. 497, 505, 69 S. Ct. 201 (1948) ("the right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury").

Petitioner Rogers was originally tried and convicted in 1980. At the time of his original trial, the relevant statute read:

> Every person indicted for a crime or offense may peremptorily challenge 12 of the jurors impaneled to try him. The state shall be allowed one-half the number of peremptory challenges allowed to the accused; provided, however, in any case in which the state announces its intention to seek the death penalty, the person indicted for the crime may

> peremptorily challenge 20 jurors and the state shall be allowed one-half the number of peremptory challenges allowed to the accused.

O.C.G.A. § 15-12-165 (code section prior to 2005 amendment).[1]

In trying the issue of mental retardation, Georgia courts are instructed to recreate a phase of the trial as it would have been conducted initially had the State, at the time of the original criminal trial, prohibited the execution of persons found to have been mentally retarded. *See Stephens*, 509 S.E.2d at 609. Thus, in the present case, if this proceeding had been part of the original trial, Rogers would have had the right to 20 peremptory challenges, twice as many as the State. Instead, however, the Georgia trial court, gave the prosecution and the defendant 15 strikes each. (T. 713). In doing so, the trial court denied Rogers substantial procedural protections that the State itself promised, and provided to, all other criminal defendants, in violation of the Fourteenth Amendment rights to due process and equal protection of the laws. *See Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 2069 (1983) (noting that due process implicates "the fairness of relations between the criminal defendant and the State" while equal protection examines "whether the State has invidiously denied

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[1] Until the 2005 amendment, the Georgia statute permitting a criminal defendant twice as many strikes as the prosecution had been in effect since 1833 with only minor variation. *See Robinson v. State*, 598 S.E.2d 466, 467 (Ga. 2004).

one class of defendants a substantial benefit available to another class of defendants").

B. The Georgia Trial Court Reversed The Order Of Jury Selection And Precluded Rogers From Exercising The Final Jury Strike.

Georgia law provides: "If a juror is found competent and is not challenged peremptorily by the state, he shall be put upon the accused. Unless he is challenged peremptorily by the accused, the juror shall be sworn to try the case." O.C.G.A. § 15-12-166. Thus, in Georgia criminal trials, the State must accept or reject each potential juror **before** the defendant is required to do so. This procedure applies equally in mental-retardation trials. *See Zant v. Foster*, 406 S.E.2d 74, 76 (Ga. 1991), *overruled on other grounds by State v. Patillo*, 417 S.E.2d 139 (Ga. 1992) ("we conclude, contrary to the trial court, that the mental-retardation trial jury should be selected in the same manner as a death-penalty criminal trial jury . . . .").

At Petitioner Rogers' hearing, the Georgia trial court required Rogers to accept or reject each juror before the State did so. After Rogers' counsel asserted that the State should accept or reject each potential juror first, the trial judge rejected that standard criminal procedure:

> THE COURT: . . . . I'm switched over to the civil rules to the extent that I can possibly do that. So, you know, that being the case, you know, you are going to have to go first.

(T. 712). Thus, the trial court refused to follow O.C.G.A. § 15-12-166.

Sakobie v. State, 154 S.E.2d 830 (Ga. App. 1967), is instructive. There, the prosecutor accepted a juror. The defense lawyer then accepted the juror. But, "immediately and almost simultaneously upon" the defense counsel accepting the juror, the prosecutor revoked his acceptance and excused the juror. *Id.* The trial court then excused the juror over the defendant's objection. On appeal, the appellate court affirmed, explaining that:

> the excusing of the juror by the trial judge over the objection of the defendant will not require a reversal, *as the stipulation does not conclusively show that the solicitor general revoked his acceptance and excused the juror after ascertaining the defendant had accepted him. The trial judge was in a much better position than this court to determine the question of fact of split-second time . . . .*

Id. (emphasis added). Thus, the appellate court deferred to the trial court in regard to the factual determination that the prosecutor had not "ascertain[ed]" that defense counsel had accepted the juror before the prosecutor changed his mind. *Sakobie* indicates, however, that if the evidence had shown that the State decided to excuse the juror after learning that the defense accepted the juror, reversal would have been required.

Below, Rogers was forced to exercise each and every one of his peremptory strikes without knowing

whether the State would excuse the potential juror. Thus, the State knew that Rogers had already accepted each and every potential juror that it excused. It is impossible to know whether the State would have excused any or all of the potential jurors whom Rogers peremptorily struck. It is often the last strike that is reserved for a juror who the other side may strike but who otherwise must be struck by – in this case – Rogers. Because of the trial court's erroneous actions, Rogers lost that opportunity.

The State of Georgia, through statute and case law, has provided procedural protections to criminal defendants that require the State to accept or reject each juror before the defendant is required to do so. The trial court had no discretion in this regard, and the failure to follow the procedure outlined in the statute is a denial of procedural protections that requires a new trial. *Cf. Sakobie*, 154 S.E.2d at 831. *See Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 2069 (1983) (noting that due process implicates "the fairness of relations between the criminal defendant and the State" while equal protection examines "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants"). Rogers' mental retardation hearing failed to provide statutory procedural rights and failed to treat Rogers the same as other similarly situated defendants. The Fourteenth Amendment cannot permit this.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 4th of February 2008.

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JAMES RANDALL ROGERS

APPENDIX A

IN THE SUPREME COURT OF GEORGIA

No. S07A1210

[Decided November 5, 2007]

ROGERS)
)
v.)
)
THE STATE)
)

Hunstein, Presiding Justice.

James Randall Rogers was convicted of murder and sentenced to death in 1985. *See Rogers v. State*, 256 Ga. 139 (344 SE2d 644) (1986). Rogers thereafter sought habeas corpus relief alleging that he is mentally retarded. Pursuant to *Fleming v. Zant*, 259 Ga. 687 (4) (386 SE2d 339) (1989), *see also Rogers v. State*, 276 Ga. 67 (1) (575 SE2d 879) (2003), a jury determined in 2005 that Rogers is not mentally retarded. He appeals. Finding no reversible error, we affirm.

1. Rogers has the burden of proving that he is mentally retarded by a preponderance of the evidence. *Fleming, supra*, 259 Ga. at 691. Mental retardation is defined as "significantly subaverage general

intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period." OCGA § 17-7-131 (a) (3). The jury heard evidence regarding six intelligence quotient ("IQ") tests administered to Rogers during his lifetime, with scores of 78, 84, 85, 68, 66 (which, due to a mathematical error, should have been 70) and 89. Expert testimony established that IQ scores between 70 and 84, while indicating borderline intellectual functioning, do not indicate mental retardation. Additionally, there was testimony that Rogers checks out prison library books on a regular basis and is able to use the computer. Three State experts who examined Rogers opined that he is not mentally retarded; three experts for Rogers disagreed. Although evidence was adduced indicating that Rogers exhibits brain dysfunction, Rogers's own expert testified that there is no way to determine what caused the dysfunction and that a person can have brain dysfunction without being mentally retarded. This expert also testified that the use of drugs and alcohol can have a significant impact on brain function and that Rogers had reported using drugs and alcohol.

Construing the evidence in favor of the verdict, a rational trier of fact could have found that Rogers failed to meet his burden of proof. *See Morrison v. State*, 276 Ga. 829, 830-831 (1) (583 SE2d 873) (2003). *See also Stripling v. State*, 261 Ga. 1, 4 (3) (b) (401 SE2d 500) (1991) (IQ test scores of 70 or below are not conclusive); *Fleming, supra*, 259 Ga. at 691 (jury not bound by expert opinions or test results, "but may weigh and consider all evidence bearing on the issue of mental retardation").

2. (a) Rogers's death sentence does not violate his equal protection and due process rights merely because, at age 19 when he committed the crimes, he may have possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit the imposition of the death penalty on offenders under age 18. *Roper v. Simmons*, 543 U.S. 551, 574 (III) (B) (125 SC 1183, 161 LE2d 1) (2005). That Court recognized that "a line must be drawn" and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* at 574.

(b) Rogers also argues that his equal protection and due process rights were violated because, due to his "organic brain damage," he has the same diminished capacities enumerated in *Atkins v. Virginia*, 536 U.S. 304, 318 (IV) (122 SC 2242, 153 LE2d 335) (2002) that are characteristic of a mentally retarded defendant, but he is treated differently because he does not have IQ scores under 70. However, Georgia's statutory definition of mental retardation is consistent with the clinical definitions relied upon in *Atkins*, compare *id.* at 308, n. 3 with OCGA § 17-7-131 (a) (3), and, contrary to Rogers's contentions, there are no "hypertechnical" requirements that a defendant have certain test scores in order to be found mentally retarded. *See Stripling, supra*, 261 Ga. at 4. We conclude that Rogers's arguments in this regard are without merit. *See* generally *Fleming, supra*, 259 Ga. at 688 (1).

We reject Rogers's contention that the trial court abused its discretion by not submitting to the jury

special interrogatories based on *Atkins* (wherein the jury would find whether Rogers has certain enumerated "diminished capacities"), along with related jury instructions and a verdict form utilizing the statutory definition of mental retardation. The trial court properly followed the procedures this Court established for *Fleming* trials by instructing the jury on the statutory definition of mental retardation set forth in OCGA § 17-7-131 (a) (3); by charging the jurors that Rogers bore the burden of proving his mental retardation by a preponderance of the evidence; and by charging the jury that they were not bound by the opinion testimony of expert witnesses or by test results, but could weigh and consider all evidence bearing on the issue. *See Fleming, supra*, 259 Ga. at 691. *See* generally *Sims v. Heath*, 258 Ga. App. 681, 687 (577 SE2d 789) (2002) (form of verdict and submission of special verdict are within trial court's discretion and will not be overturned absent abuse of that discretion).

3. We find no abuse of the trial court's discretion in the exercise of its inherent power to control court proceedings by limiting the number of attorneys permitted to speak before the court to the two attorneys appointed to Rogers. *Lynd v. State*, 262 Ga. 58, 62 (9) (a) (414 SE2d 5) (1992). Although the trial court prevented a pro bono member of Rogers's defense team from arguing certain motions, it did not prevent her from continuing to assist defense counsel. Compare *United States v. Gonzalez-Lopez*, ___ U. S. ___ (126 SC 2557, 2563, 165 LE2d 409) (2006). Rather, it merely limited argument to Rogers's lead counsel and co-counsel, both of whom were appointed two years before Rogers's trial with his full agreement and

in response to his counsel's motion that, as a precautionary measure, death-qualified counsel be appointed. *See* Unified Appeal Procedure (II) (A) (1). Furthermore, Rogers's co-counsel, who ultimately argued the motions at issue, never intimated that he was not prepared to go forward. The record shows that he was familiar with the facts and issues involved, having the previous day conducted the expert's deposition that formed a substantial basis for the motions, and the trial court had before it the written motions and supporting briefs submitted by Rogers's counsel.

4. Rogers contends that the trial court erred by conducting his mental retardation trial as a civil, rather than a criminal, proceeding. *See* generally *Stephens v. State*, 270 Ga. 354, 356 (2) (509 SE2d 605) (1998) (*Fleming* trial is deemed part of guilt/innocence phase). Specifically, Rogers argues that the trial court erred by failing to follow OCGA § 15-12-166, which provides that in criminal cases the State must accept or reject each potential juror before the defendant is required to do so. However, our review of the record establishes that Rogers repeatedly reiterated that his *Fleming* trial should be conducted as a civil proceeding,[1] that the trial court denied Rogers's

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[1] During the pretrial conference, the trial court asked defense counsel, "[I]s this in the nature of a civil case?" to which counsel responded unequivocally, "Yes, sir." Additionally, counsel stated to the jury during voir dire that "the Georgia law on what you as a jury will be looking at in this particular case . . . is a civil matter"; stated in opening that, "This is, as the Judge said, a civil case dealing with one issue"; and proceeded under and argued the

request regarding the order of juror questioning based on these representations by counsel, and that Rogers then acquiesced to the trial court's ruling.[2] Under these circumstances, we find that Rogers has waived any objection to the trial court conducting his *Fleming* trial as a civil proceeding and to the order of the exercise of his peremptory challenges. *See Pye v. State*, 269 Ga. 779, 787 (14) (505 SE2d 4) (1998) (party cannot ignore perceived error at trial, take chance on favorable verdict, and then complain on appeal).

5. Any error in the application of OCGA § 15-12-165 (State and defendant in death penalty cases each allowed 15 peremptory challenges) to

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civil rules for the admission of expert testimony. *See* OCGA § 24-9-67.1 and Division 7, *infra*.

[2] The trial transcript shows that once voir dire was completed and counsel were preparing to strike the jury, the following exchange took place:

[Defense Counsel]: And who goes first?
THE COURT: Well, you get to go first.
[Defense Counsel]: We would like for the State to go first.
THE COURT: Well, you know, this -- you are going to get to make the first opening statement. You are going to get to open and close of the final argument. . . . [T]his is, we say a civil case, . . . And so, I'm switched over to the civil rules to the extent that I can possibly do that. So, you know, that being the case, you know, you are going to have to go first.
[Defense Counsel]: I understand, Judge.
THE COURT: Okay.
[Defense Counsel]: I just wanted to get that clarified.

Rogers's trial was invited by defense counsel and, as such, is not grounds for reversal. *Pye*, *supra*, 269 Ga. at 787 (14). *See also Madison v. State*, 281 Ga. 640, 642 (2) (c) (641 SE2d 789) (2007) (defendant not deprived of protected right by retroactive application of OCGA § 15-12-165, reducing number of peremptory strikes, as peremptory strikes are procedural and not substantive in nature).

6. Rogers contends the trial court erred by admitting the testimony and materials of the State's witness, psychologist Dr. Richard Hark. Dr. Hark examined Rogers in 1976 when he was in a juvenile detention center and administered intelligence and personality tests to Rogers in 1977 at the request of the juvenile court (the "1977 report"). Dr. Hark administered these tests again in 1980 during the course of Rogers's murder trial[3] pursuant to an order of the trial court, which was entered in response to the request by Rogers's counsel for a psychological evaluation (the "1980 report"). In his mental retardation trial, Rogers filed motions in limine to exclude Dr. Hark's testing materials and testimony; the trial court deferred its ruling until the State sought to introduce this testimony and evidence during trial, when Dr. Hark would be available for voir dire.

(a) As to the 1977 report, Rogers called a mental health expert who had executed an affidavit in which

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[3] Rogers's original convictions and sentences in 1982 were reversed on direct appeal due to the unconstitutional composition of the Floyd County grand jury. *Devier v. State*, 250 Ga. 652 (1) (300 SE2d 490) (1983).

the expert stated he considered Dr. Hark's 1977 report when rendering his opinion. The State cross-examined the witness about the 1977 report and the trial court overruled Rogers's objection because of his expert's affidavit. Rogers then explored the validity of the 1977 report on re direct. Subsequently, when the State sought to call Dr. Hark, the trial court examined the witness and ruled inadmissible his testimony and materials related to the 1977 report, finding that Dr. Hark had seen Rogers for treatment. *See State v. Herendeen*, 279 Ga. 323 (613 SE2d 647) (2005) (psychotherapeutic privilege invoked when treatment given or contemplated).

Rogers contends the trial court erred by deferring its ruling. However, a "trial court has an absolute right to refuse to decide the admissibility of evidence . . . prior to trial. [Cits.]" *State v. Johnston*, 249 Ga. 413, 415 (291 SE2d 543) (1982). Although Rogers also contends the trial court erred by refusing to give a curative instruction regarding Dr. Hark's 1977 report, Rogers acquiesced during the charge conference to the trial court's decision to give the jury a general curative instruction to consider as evidence only the exhibits admitted and with them in the jury room, which did not include the 1977 report. Because Rogers did not object or request further instructions after the jury was charged, he has failed to preserve this issue for appeal. *Fann v. State*, 254 Ga. 514, 517 (3) (331 SE2d 547) (1985).[4]

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[4] We note that defense counsel in closing argument stated to the jury that the tests administered by Dr. Hark in 1977 had been

(b) As to the 1980 report, the trial court admitted Dr. Hark's testimony and materials, finding that Dr. Hark saw Rogers only for evaluation purposes, specifically to explore the possibility of an insanity plea, rather than for professional treatment. *See Herendeen, supra*, 279 Ga. at 326. Rogers challenges this ruling, first contending that these materials are protected by the psychologist/patient privilege, OCGA §§ 24-9-21 (6) and 43-39-16, because the order directing Dr. Hark to examine Rogers stated that "the relationship between Dr. Hark and Defendant Rogers shall be treated as if the Defendant himself were the employer of Dr. Hark." However, the order also states that "[c]ommunications between [Rogers] and a private psychologist would be privileged . . . as long as there was an expectation of confidentiality." Under Georgia law, there can be no expectation of confidentiality based on the psychologist/patient privilege when the sole purpose of the relationship is evaluation. *Herendeen, supra*. Even assuming, arguendo, that such privilege existed as to the 1980 report, when Rogers "raise[d] a claim of mental retardation, putting [his] mental capacity at issue, 'such affirmative defense waive[d] the privilege under OCGA § 24-9-21 (5) through (8).' [Cit.]" *Perkinson v. State*, 279 Ga. 232, 236 (6) (610 SE2d 533) (2005). We reject Rogers's argument that because the psychologist/patient privilege has been placed on a par with the attorney/client privilege, OCGA § 43-39-16, it affords any greater protection. *See Wiles v. Wiles*, 264 Ga. 594, 599-600 (449 SE2d 681) (1994) (Sears, J.,

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removed by the trial court and the jurors should "wipe [their] mind[s] clear of those particular documents."

concurring) (Legislature did not intend to give psychologists' patients greater protection than psychiatrists' patients).

Citing OCGA § 9-11-26, Rogers also contends that the 1980 report is protected under the work product doctrine. Pretermitting whether Rogers is correct in relying on the Civil Practice Act, see Division 4, *supra*, the trial court did not abuse its discretion by ruling that Rogers had waived any privilege based on work product. In 2001, the State sought to obtain Rogers's records "relat[ed] to his mental abilities." After a hearing, the trial court found that the records sought by the State "are essential for the defense of the action pending before the Court" and ordered that Rogers's mental health records, including those of Dr. Hark, be released to the State. As Rogers failed to assert his work product privilege claim at that time, it was waived. *See Gen. Motors Corp. v. Conkle*, 226 Ga. App. 34, 46-47 (2) (486 SE2d 180) (1997).

7. Pretermitting whether the trial court erred by applying OCGA § 24-9-67.1 (expert witness testimony in civil proceedings) rather than OCGA § 24-9-67 (expert witness testimony in criminal cases), see Division 4, *supra*, we find no error in the admission of testimony of the following expert witnesses.

(a) The trial court qualified James Mills, a licensed professional counselor and qualified psychometrist, as an expert in the administration of intelligence tests after hearing testimony regarding his relevant education and experience. Mills testified for the State regarding the Wechsler Adult Intelligence Scales-Third Edition test (WAIS-III) he administered

to Rogers in 2000. He testified that he does not independently perform the tests, *see* OCGA § 43-10A-22; rather, he assists psychologists by performing psychometrics, i.e., the administration of the tests; the tests are subsequently interpreted by a supervising psychologist. He testified that he recorded Rogers's responses, as he had been trained to do, and turned over the completed test, including his notes and scoring calculations, to his supervisor, licensed psychologist Dr. Don Harris, who reviewed and interpreted Rogers's responses to the test. Mills's testimony was limited to the manner in which the test was administered and he never gave an opinion as to whether or not Rogers is mentally retarded.

We reject Rogers's argument that Dr. Harris had to be physically present in the room with Mills during Rogers's testing session in order to supervise him. Nor has Rogers shown from Mills's unrebutted testimony regarding the manner in which the testing was conducted that the results were unreliable. We find no abuse of the trial court's discretion in qualifying Mills as an expert, *Williams v. State*, 279 Ga. 731, 732 (2) (620 SE2d 816) (2005), or in admitting the sufficiently relevant and reliable evidence regarding the WAIS-III test administered by Mills. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U. S. 579, 597 (IV) (113 SC 2786, 125 LE2d 469) (1993); *Atkins, supra*, 536 U. S. at 309, n. 5 (WAIS-III is standard instrument for assessing intellectual functioning); *Gen. Elec. Co. v. Joiner*, 522 U. S. 136, 139 (118 SC 512, 139 LE2d 508) (1997) (standard of review for *Daubert* ruling is abuse

of discretion).[5] The weight and credibility to give the testimony of Mills was a matter for the jury. *Boswell v. State*, 275 Ga. 689, 691 (2) (572 SE2d 565) (2002).

(b) Dr. Samuel Perri, who was qualified as an expert in the field of forensic psychology, testified that he was experienced in administering WAIS III tests; that he reviewed the raw data from the WAIS-III administered to Rogers by Mills in 2000 and consulted with Dr. Harris, who had supervised Mills; that he conducted a clinical interview with Rogers; and that he relied on these and other factors to form his professional opinion that Rogers is not mentally retarded. Defense counsel subjected Dr. Perri to a thorough and sifting cross-examination. The trial court did not abuse its discretion by allowing this evidence, and the weight and credibility to give the WAIS-III and Dr. Perri's testimony was a matter for the jury. *Boswell, supra*.[6]

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[5] Although Rogers contends that a comparison of the answers given by him in the 1977, 1980 and 1995 intelligence tests with those recorded in the test administered by Mills indicates that prosecutorial misconduct occurred, he has failed to set forth any evidence to prove this allegation. *See Richey v. State*, 261 Ga. App. 720, 724 (2) (583 SE2d 539) (2003).

[6] Rogers contends that if Mills was supervised by Dr. Harris, and Dr. Harris interpreted the WAIS-III administered by Mills, the testimony of both Mills and Dr. Perri regarding the test results constituted impermissible testimonial hearsay, as Rogers was denied his right to confront Dr. Harris. *See Crawford v. Washington*, 541 U. S. 36 (124 SC 1354, 158 LE2d 177) (2004). Pretermitting whether any statements made by Dr. Harris would

(c) Contrary to Rogers's contention, the record establishes that Dr. Hark formed his opinion regarding Rogers's mental status based on his clinical interview with Rogers and intelligence testing and not upon the personality tests, later determined to be unreliable, that he administered to Rogers in 1977 and 1980. We thus find no abuse of the trial court's discretion by allowing Dr. Hark to testify.

(d) The trial court did not err by denying Rogers's request to admit testimony regarding the contents of affidavits used, in part, by his expert witnesses as the basis for their opinions regarding Rogers's mental status. Applying OCGA § 24-9-67.1 (a) (otherwise inadmissible facts used as basis for expert opinion shall not be disclosed to jury unless court determines their probative value substantially outweighs their prejudicial effect), the trial court first found that the facts contained in the disputed affidavits were otherwise inadmissible hearsay, as they rested on the veracity and competency of persons not in court, OCGA § 24-3-1 (a), and did not come within any statutorily-recognized hearsay exception. *See* OCGA §§ 24-3-3 through 24-3-17.[7] The trial court then balanced the probative value of these affidavits against their prejudicial effect, noting that the affidavits were

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be considered testimonial, *id.* at 68, neither Mills nor Dr. Perri testified as to any such statements.

[7] While Rogers argues that one of the affidavits was admissible under the necessity exception because the affiant was deceased, OCGA § 24-3-1 (b), the trial court did not err by finding that Rogers failed to make the requisite showing for its admission. *See Chapel v. State*, 270 Ga. 151, 155 (510 SE2d 802) (1998).

originally submitted in Rogers's habeas proceeding. Several of them contained identical language, casting suspicion on their trustworthiness, and some contained conclusory statements and irrelevant and prejudicial information related to Rogers's alleged alcohol and drug use and the crime for which he was convicted. As the little probative information the affidavits contained was cumulative of other evidence and not needed to explain the basis for the experts' opinions, the trial court did not abuse its discretion by refusing to admit the information contained in the affidavits. *See Leonard v. State*, 269 Ga. 867, 870-871 (3) (506 SE2d 853) (1998) (testifying expert not to serve as conduit for opinions of others).

8. Although "a witness may not be impeached based upon a discrepancy relating to a wholly immaterial matter, [cit.]" *Brown v. State*, 260 Ga. 153, 156 (4) (391 SE2d 108) (1990), we find no error in the trial court's admission of impeachment evidence introduced by the State that reflected on the credentials and competency of a defense expert witness, a collateral issue that was indirectly material to the issue in the case. *Carswell v. State*, 263 Ga. App. 833, 834 (2) (589 SE2d 605) (2003). The State's evidence reflected that at the time a defense expert in the field of psychology prepared an affidavit indicating his opinion that Rogers manifested substantially subaverage intellectual functioning before age 18, the expert was on probation following a suspension by the Georgia State Board of Examiners of Psychologists; the State's evidence rebutted the expert's trial testimony regarding the grounds for that suspension and included the Board's decision that the expert's admitted conduct fell below minimum standards of

care. This evidence reflected on the expert's credentials and competency, thus challenging his credibility and opinion as to Rogers's intelligence, the issue in this case. Under the circumstances, we conclude that the trial court did not abuse its discretion in admitting the impeachment evidence. *See Kennebrew v. State*, 267 Ga. 400, 403 (3) (480 SE2d 1) (1996) (scope of cross-examination lies in sound discretion of trial court). Compare *King v. State*, 273 Ga. 258, 273 (30) (539 SE2d 783) (2000) (questioning defense expert about *pending* complaint against him was improper impeachment).[8]

9. We find no error in the admission of two letters handwritten by Rogers that were used by the State to cast doubt on his mental retardation claim.

> Proof of handwriting may be resorted to in the absence of direct evidence of execution. In such case, any witness who shall swear that he knows or would recognize the handwriting shall be competent to testify as to his belief. The source of his knowledge shall be a question for investigation and shall go entirely to the credit and weight of his evidence.

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[8] Assuming, arguendo, that the issue is properly before us, the trial court did not err by allowing the decision of the Board to go out with the jury because the prima facie evidentiary value of the decision was not dependent on the credibility of its drafter and thus it was not subject to the continuing witness rule. *Bryant v. State*, 270 Ga. 266, 270-271 (3) (507 SE2d 451) (1998).

OCGA § 24-7-6. A Department of Corrections employee authenticated the letters after testifying that he would recognize Rogers's handwriting because he had observed Rogers sign his name and had received written communications from him. The witness's statement that the handwriting in the body of the letters "appears to be that of Mr. Rogers" did not render his testimony too tentative to support a finding of authenticity. *See Jones v. State*, 165 Ga. App. 260, 261 (1) (299 SE2d 920) (1983).

10. A correctional officer was called by the State to testify regarding Rogers's behavior while incarcerated. Rogers maintains that the trial court erred by allowing irrelevant and prejudicial testimony by this witness, namely, that Rogers is not housed in the area of the institution with those inmates the officer had been told are mentally retarded. The officer's testimony was relevant to the issue of Rogers's adaptive skills, however, and was not unduly prejudicial because the officer clarified that he was not diagnosing anyone. We also find no merit in Rogers's argument that this testimony constituted an impermissible lay opinion, *see* OCGA § 24-9-65, because the officer was never asked for, nor did he ever give, an opinion as to the ultimate issue, i.e., whether Rogers is or is not mentally retarded.

11. "[I]t remains the case that '(t)his State does not recognize the cumulative error rule' [cit.]," *Schofield v. Holsey*, 281 Ga. 809, 812, n. 1 (642 SE2d 56) (2007), and we decline to do so under the circumstances of this appeal.

Judgment affirmed. All the Justices concur.

APPENDIX B

SUPREME COURT OF GEORGIA

No. S07A1210

[Filed January 13, 2003]

ROGERS	)
	)
v.	)
	)
THE STATE.	)
	)

Doffermyre, Shields, Canfield, Knowles & Devine, LLC, Ralph I. Knowles, Jr., C. Rebecca Smith, Andrews & Knowles, C. Cooper Knowles, Atlanta, for appellant.

Bryant G. Speed, II, Dist. Atty., Thurbert E. Baker, Atty. Gen., Susan V. Boleyn, Senior Asst. Atty. Gen., for appellee.

HUNSTEIN, Justice.

Appellant James Rogers challenges the trial court's order finding that he waived his request for a jury trial on the issue of mental retardation pursuant to *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989). Because we hold that a defendant who was tried for a capital crime prior to July 1, 1988 cannot waive his request

for a hearing to determine whether he is mentally retarded once a court finds sufficient credible evidence of mental retardation to create an issue for a jury, we reverse and remand to the trial court.

1. Rogers was convicted and sentenced to death for the murder of Grace Perry.[1] His convictions and sentence were affirmed by this Court on direct appeal. *See Rogers v. State,* 256 Ga. 139, 344 S.E.2d 644 (1986). Following the procedure outlined by this Court in *Fleming,* in 1994 Rogers initiated state habeas corpus proceedings by filing a petition seeking a jury trial on the issue of mental retardation. At a hearing on his petition, Rogers presented evidence of mental retardation, including affidavits of mental health experts who diagnosed him as mentally retarded and suffering from significant neurological impairment.[2] In a May 1995 order the habeas corpus court concluded that a genuine issue of fact existed regarding Rogers' mental retardation and granted the writ for the purpose of conducting a *Fleming* trial.

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[1] Rogers was convicted in 1982 for the murder of Perry and aggravated assault of Edith Polston and sentenced to death. On direct appeal, this Court reversed his convictions and sentences based on the unconstitutional composition of the Floyd County grand jury. *See Devier v. State,* 250 Ga. 652(1), 300 S.E.2d 490 (1983). After a second trial, Rogers was again found guilty of murder and aggravated assault and sentenced to death for the murder conviction and a consecutive ten-year sentence for aggravated assault.

[2] Rogers also provided affidavits of teachers, former attorneys, and family members supporting the diagnosis of mental retardation.

On return to the trial court, counsel was appointed to represent Rogers in the jury trial on the issue of mental retardation. In February 2001, just before the scheduled hearing, Rogers wrote a letter to the judge asking for the dismissal of the mental retardation trial. The court held a hearing on Rogers' request during which Rogers stated to the court that he was not mentally retarded. The following day the trial court entered its order finding Rogers "knowingly and voluntarily waive[d] his right to a jury trial on this issue of mental retardation."

In March 2001, with new counsel, Rogers filed a "Consolidated Motion to Vacate Dismissal of Mental Retardation Trial, To Withdraw Waiver, To Reinstate Mental Retardation Trial And/Or Notice of Appeal to Dismissal Order." An attachment to the motion contained a handwritten note from Rogers stating, "I want to have my case back in court. I want to have the court rule on my innocence. I want the court to rule on my IQ." The trial court conducted a hearing on this motion in June 2001. Before the court ruled on the motion, however, Rogers mailed another letter to the court stating, "I do not want the mental retardation trial and I would like it dismissed." On July 24, 2001, the trial court entered an order denying the motion and holding that Rogers waived a jury trial on the issue of mental retardation. Rogers' direct appeal of that order was dismissed as untimely. He thereafter filed a motion for and was granted an out-of-time appeal. On appeal, Rogers challenges the trial court's order finding that he waived his right to a trial on the issue of mental retardation.

2. Under both the Georgia and United States Constitutions, a criminal defendant may not be put to death if he is found to be mentally retarded. *See Atkins v. Virginia,* 536 U.S. 304(IV), 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Fleming, supra*, 259 Ga. at 690, 386 S.E.2d 339. Accordingly, where a defendant's mental capacity is challenged or otherwise appears to be in question, the Georgia and United States Constitutions require adjudication of the defendant's mental capacity in order to determine his or her eligibility for a death sentence. In Georgia, the procedure to be followed in making such a determination depends upon the date of trial. For those defendants tried after July 1, 1988, OCGA § 17-7-131 permits them to contend that they were mentally retarded at the time of the crime and to present evidence of such mental retardation to the fact finder. In capital cases, the fact finder is then required to determine during the guilt-innocence phase of trial whether the defendant is guilty but mentally retarded. OCGA § 17-7-131(j). Under this statutory scheme, where the trier of fact makes a specific finding that the defendant is mentally retarded, the defendant cannot be executed but must instead be sentenced to life imprisonment.[3] *Id.*

A defendant tried prior to July 1, 1988, for whom no judicial determination on mental retardation will

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[3] Because Rogers was tried prior to the effective date of OCGA § 17-7-131, we do not here reach the issue of whether a defendant who has contended pursuant to OCGA § 17-7-131 that he is mentally retarded may thereafter waive a determination of that issue by the fact finder.

have been made, may choose to raise the issue of his or her mental retardation by filing a petition for habeas corpus and presenting sufficient credible evidence, including at least one expert diagnosis of mental retardation, to create a genuine issue regarding retardation. *Fleming, supra* at 691(4), 386 S.E.2d 339.

If, after examining the evidence, the habeas corpus court finds that there is a genuine issue, a writ shall be granted for the limited purpose of conducting a trial on the issue of retardation only. This trial shall be held in the court in which the original trial was conducted. Petitioner shall be entitled to a full evidentiary hearing on the issue of retardation. The determination shall be made by a jury using the definition of retardation enunciated in the statute. *See* OCGA § 17-7-131(a)(3).

Id. The *Fleming* trial allows petitioners to establish judicially whether mental retardation is a genuine issue and obtain resolution of that issue through a jury trial. Once a petitioner carries his burden of proof in the habeas corpus court of creating a genuine issue regarding his mental retardation, the issue must be thoroughly reviewed and passed upon. *Id.* At such point in the proceedings, the issue is no longer subject to waiver by a petitioner. This holding is consistent with our opinion in *Fleming* and the national and statewide consensus against the execution of mentally retarded persons.

3. In this case, pursuant to our decision in *Fleming*, Rogers chose to initiate habeas corpus proceedings by filing a petition alleging he is mentally retarded. He thereafter adduced sufficient credible evidence of such

retardation to authorize the habeas corpus court to grant the writ and remand to the superior court for a full evidentiary hearing on the issue of his retardation. Despite the habeas corpus court's findings and this Court's mandate in *Fleming* that a jury trial be held on the petitioner's retardation when his mental capacity is properly placed in issue, the trial court nevertheless concluded that Rogers could voluntarily waive his right to a trial on retardation. We reject this holding. Once a habeas corpus court finds a petitioner has adduced sufficient credible evidence of mental retardation to create an issue for a jury, it is the duty of the trial court to conduct a jury trial on the issue of mental retardation pursuant to the procedures established in *Fleming*.[4] Because the trial court in this case failed to conduct a jury trial on the issue of Rogers' mental retardation, we reverse and remand to the trial court for proceedings consistent with this opinion.

Judgment reversed and remanded.

All the Justices concur, except CARLEY, J., who dissents.

CARLEY, Justice, dissenting.

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[4] We reject the State's contention that the trial court properly resolved the mental retardation issue by finding in its dismissal order that Rogers is not mentally retarded. The State's argument ignores the plain language in *Fleming* requiring that the determination of whether a defendant is mentally retarded be decided by a jury.

The trial court certainly had the duty to give Rogers the opportunity to try the issue of mental retardation before a jury. *Fleming v. Zant,* 259 Ga. 687, 691(4), 386 S.E.2d 339 (1989). And, in fact, the trial court fulfilled that obligation. Having been granted a jury trial, Rogers elected to waive his right in that regard. Thus, the only issue before this Court is whether he was authorized to do so. Without citing supporting authority, the majority holds that, despite the waiver, it was "the duty of the trial court to conduct a jury trial on the issue of mental retardation pursuant to the procedures established in *Fleming.*" Majority opinion, p. 70, 575 S.E.2d at 882. I disagree and believe that Rogers could and did waive his right to a jury trial, and that the trial court, acting as the trier of fact, properly addressed and resolved the issue of his alleged mental retardation.

Nothing in *Fleming* holds that the procedure which it established is mandatory and cannot be waived. Even the right to trial by jury guaranteed by the Federal and Georgia Constitutions may be waived. Thus, the majority now elevates the right to a jury trial recognized in *Fleming* to a higher status than the comparable constitutional right. However, the purpose of the *Fleming* trial on the issue of retardation is to give defendants "'*essentially the same opportunity* to litigate the issue of (their) mental retardation as (they) would have had if the case(s) were tried today, with the benefit of the OCGA § 17-7-131(j) death-penalty exclusion.' [Cit.]" (Emphasis supplied.) *Burgess v. State,* 264 Ga. 777, 790(36), 450 S.E.2d 680 (1994). Under OCGA § 17-7-131(j), the accused does not have a non-waivable right to a jury trial. That provision clearly provides that, "should ... the jury *or court* find

in its verdict that the defendant is guilty of the crime charged but mentally retarded, the death penalty shall not be imposed...." (Emphasis supplied.) Thus, the statute itself contemplates that the matter need not be resolved by a jury and, if Rogers were tried today, he could waive his right to a jury trial.

Accordingly, today's opinion is contrary to the correct construction of *Fleming,* in that it deprives the defendant of the comparable opportunity afforded by OCGA § 17-7-131(j) to waive his right to a jury trial and to submit the issue of mental retardation to the trial court. However, the majority contends that such construction "ignores the plain language in *Fleming* requiring that the determination of whether a defendant is mentally retarded be decided by a jury." Majority opinion, p. 70, fn. 4, 575 S.E.2d at 882, fn. 4. I submit that, to the contrary, the majority's analysis ignores the plain language in OCGA § 17-7-131(j) authorizing an accused to waive his right to a jury determination of mental retardation.

The fact that the 1995 habeas court ruled in favor of Rogers is immaterial. That was an entirely separate proceeding. *Zant v. Foster,* 261 Ga. 450, 451(3), 406 S.E.2d 74 (1991), overruled on other grounds, *State v. Patillo,* 262 Ga. 259, 261, fn. 1, 417 S.E.2d 139 (1992). The habeas court concluded only that there was reason to hold a trial as to retardation. It did not hold that Rogers was retarded or that he had an unwaivable right to have a jury make that determination. After the matter was returned to the trial court, Rogers sought to waive the jury trial he previously obtained from the habeas court. The trial court did not summarily accept this waiver. Instead, it conducted an

evidentiary hearing and found, as a matter of fact, that Rogers was not mentally retarded. The trial court also found that Rogers was aware of the consequences of relinquishing his right to the scheduled jury trial and that he waived that right knowingly and voluntarily. The majority does not contest the sufficiency of the evidence to authorize those findings. Thus, the effect of today's holding is that, as a matter of law, one who is competent to waive his rights and who does so freely and intelligently is nevertheless not bound by his waiver. I submit that, by its creation of a non-waivable legal right to a jury trial, the majority misinterprets *Fleming* so as to deprive a competent accused of the fundamental right to make intelligent and voluntary decisions for himself. The purpose of the judiciary is not to construe the law so as to protect citizens from what the courts perceive to be bad choices, but to ensure that the law as it exists is applied correctly and enforced uniformly. In my opinion, Rogers waived his right to a jury trial under existing law, and that waiver is valid and enforceable despite the majority's holding to the contrary.

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No. 07-1025

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In The Supreme Court of the United States

JAMES RANDALL ROGERS,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE
QUESTIONS PRESENTED

1.

SHOULD THIS COURT DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE GEORGIA SUPREME COURT APPLYING THAT STATE'S OWN STATUTE IN ACCORD WITH THE JURISPRUDENCE OF THIS COURT?

2.

SHOULD THIS COURT DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE STATE COURT WHICH RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS?

3.

SHOULD THIS COURT DECLINE TO GRANT CERTIORARI ON A CLAIM THAT IS NOT PROPERLY BEFORE THIS COURT?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner/Appellant, James Randall Rogers, was convicted of the murder of Grace Perry and the aggravated assault of Edith Polston. Petitioner/Appellant, (hereinafter Petitioner), was sentenced to death for the murder and ten years for aggravated assault. On direct appeal, the Georgia Supreme Court affirmed Petitioner's convictions and sentences.[1] *Rogers v. State*, 256 Ga. 139, 344 S.E.2d 644, *cert. denied*, 107 S. Ct. 600 (1986). Petitioner thereafter filed a state habeas corpus petition alleging, *inter alia*, that he was mentally retarded. The habeas corpus court remanded Petitioner's case to Floyd County for a jury trial on the issue of Petitioner's alleged mental retardation under the procedure set forth by the Georgia Supreme Court in *Fleming v. Zant*, 259 Ga. 687, 386 S.E.2d 339 (1989).

Before the jury trial on Petitioner's mental retardation, Petitioner wrote a letter to the trial court asking for dismissal of the proceedings. The trial court held a hearing during which Petitioner denied being mentally retarded. The trial court found that Petitioner knowingly and voluntarily waived the

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[1] Previously, Rogers' conviction and sentence were overturned due to a disparity of women on the grand jury panel. *Rogers v. State*, 250 Ga. 652, 300 S.E.2d 490 (1983).

right to a jury trial on mental retardation. Subsequently, with new counsel, Petitioner sought to set aside the dismissal and withdrew the waiver. However, before the court ruled on the motion, Petitioner again wrote a letter seeking dismissal of the trial. The trial court again found a waiver of Petitioner's right to a mental retardation trial. On appeal, the Georgia Supreme Court held, pursuant to *Fleming v. Zant*, 259 Ga. at 691, that Petitioner's trial for a capital offense was prior to July, 1, 1988;[2] and, as such, once the habeas court found a genuine issue regarding mental retardation, the issue must be reviewed and was not subject to waiver. *Rogers v. State*, 276 Ga. 67, 575 S.E.2d 879 (2003).

Petitioner's mental retardation claim proceeded to a civil jury trial in August 2005. Following the presentation of evidence by Petitioner, and by the State, the jury returned a verdict finding Petitioner not to be mentally retarded. (Record hereinafter "R" p. 2057).

The Georgia Supreme Court affirmed the jury's verdict on November 5, 2007.

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[2] This date was set to coincide with the enactment of the amendment O.C.G.A. § 17-7-131(j) in 1988.

PART TWO

STATEMENT OF THE FACTS

The Georgia Supreme Court summarized the evidence presented by the State at Petitioner's trial as follows:

> The jury heard evidence regarding six intelligence quotient ("IQ") tests administered to Rogers during his lifetime, with scores of 78, 84, 85, 68, 66 (which, due to a mathematical error, should have been 70) and 89. Expert testimony established that IQ scores between 70 and 84, while indicating borderline intellectual functioning, do not indicate mental retardation. Additionally, there was testimony that Rogers checks out prison library books on a regular basis and is able to use the computer. Three State experts who examined Rogers opined that he is not mentally retarded; three experts for Rogers disagreed. Although evidence was adduced indicating that Rogers exhibits brain dysfunction, Rogers's own expert testified that there is no way to determine what caused the dysfunction and that a person can have brain dysfunction without being mentally retarded. This expert also testified that the use of drugs and alcohol can have a significant impact on brain function and that Rogers had reported using drugs and alcohol.

Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A MERE DISAGREEMENT WITH A DECISION OF THE GEORGIA SUPREME COURT APPLYING THAT STATE'S OWN STATUTE TO THE FACTS OF PETITIONER'S CASE IN ACCORDANCE WITH THE JURISPRUDENCE OF THIS COURT.

Petitioner urges this Court to grant certiorari to consider his claim that his execution would violate his Eighth and Fourteenth Amendment rights because he was only nineteen (19) when he committed the crime and suffered from a diminished capacity similar to that of mentally retarded individuals. Respondent submits that the instant ground of this petition for a writ of certiorari merely constitutes Petitioner's disagreement with the decision of the Georgia Supreme Court applying its own statute, O.C.G.A. § 17-7-131(a)(3), in accordance with the jurisprudence of this Court in *Atkins v. Virginia*, 536 U.S. 304, 318 (IV), 122 S. Ct. 2242 (2002). Further, the Georgia Supreme Court appropriately applied this Court's ruling in *Roper v. Simmons*, 543 U.S. 551, 574 (III) (B), 125 S. Ct. 1183 (2005), holding individuals who commit a crime under the age of eighteen may not be executed. As the Georgia Supreme Court's decision regarding these issues are in accordance with this Court's holding, Petitioner has

failed to present an issue warranting review by this Court.

Petitioner alleges he demonstrated at trial that he suffered from a diminished capacity similar to that of individuals who are mentally retarded and this "diminished capacity" prohibits his execution because it would constitute cruel and unusual punishment and violate his right to equal protection. Petitioner's attempts to circumvent his failure to prove at trial that he is mentally retarded with his current argument to this Court, however, contrary to Petitioner's assertions, there does not exist a new standard prohibiting the imposition of the death penalty because an individual has "diminished capacity."

The Georgia Supreme Court, applying the State statutory law in accord with the jurisprudence of this Court, found the following regarding Petitioner's diminished capacity argument:

> Rogers also argues that his equal protection and due process rights were violated because, due to his "organic brain damage," he has the same diminished capacities enumerated in *Atkins v. Virginia*, 536 U.S. 304, 318 (IV), 122 S. Ct. 2242 (2002), that are characteristic of a mentally retarded defendant, but he is treated differently because he does not have IQ scores under 70. However, Georgia's statutory definition of mental retardation is consistent with the clinical definitions relied upon in *Atkins*, compare *id.* at 308, n. 3 with OCGA § 17-7-131(a)(3), and, contrary to

> Rogers's contentions, there are no "hypertechnical" requirements that a defendant have certain test scores in order to be found mentally retarded. See *Stripling*, supra, 261 Ga. at 4. We conclude that Rogers's arguments in this regard are without merit.

Rogers, 282 Ga. at 660-661.

Furthermore, the Georgia Supreme Court properly applied the rulings of this Court in *Roper* when it held the following:

> Rogers's death sentence does not violate his equal protection and due process rights merely because, at age 19 when he committed the crimes, he may have possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit the imposition of the death penalty on offenders under age 18. *Roper v. Simmons*, 543 U.S. 551, 574 (III) (B) (125 S. Ct. 1183, 161 LE2d 1) (2005). That Court recognized that "a line must be drawn" and "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." *Id.* at 574.

Rogers, 282 Ga. at 660.

Therefore, as the Georgia Supreme Court properly applied its own statute and the jurisprudence of this Court, Petitioner's mere disagreement with the

decision of the Georgia Supreme Court presents no basis for the grant of certiorari review.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A DECISION OF THE STATE COURT WHICH RESTS ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

Petitioner asserts he was denied assistance of counsel in violation of this Court's rulings in *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557 (2006) and the Sixth Amendment when the Georgia Supreme Court upheld the trial court's ruling that a pre-trial motion had to be argued by lead counsel and co-counsel instead of another member of his defense team. Respondent submits this claim rests upon adequate and independent state grounds as the Georgia Supreme Court applied state law precedent to determine this issue and does not serve as an appropriate basis for the granting of a petition for a writ of certiorari.

A. The Georgia Supreme Court's Ruling Rests Upon An Independent And Adequate State Law Ground.

During pre-trial motions a member of Petitioner's defense team stood to argue a motion, but the trial court ruled that only lead counsel and co-counsel were allowed to speak in court. Moreover, the attorney in question was allowed to remain a member of

Petitioner's defense team. In determining whether the trial court properly ruled on this issue, the Georgia Supreme Court found the following:

> We find no abuse of the trial court's discretion in the exercise of its inherent power to control court proceedings by limiting the number of attorneys permitted to speak before the court to the two attorneys appointed to Rogers. *Lynd v. State*, 262 Ga. 58, 62 (9) (a) (414 SE2d 5) (1992). Although the trial court prevented a pro bono member of Rogers's defense team from arguing certain motions, it did not prevent her from continuing to assist defense counsel. Compare *United States v. Gonzalez-Lopez*, ___ U. S. ___ (126 S. Ct. 2557, 2563, 165 LE2d 409) (2006). Rather, it merely limited argument to Rogers's lead counsel and co-counsel, both of whom were appointed two years before Rogers's trial with his full agreement and in response to his counsel's motion that, as a precautionary measure, death-qualified counsel be appointed. See Unified Appeal Procedure (II) (A) (1). Furthermore, Rogers's co-counsel, who ultimately argued the motions at issue, never intimated that he was not prepared to go forward. The record shows that he was familiar with the facts and issues involved, having the previous day conducted the expert's deposition that formed a substantial basis for the motions, and the trial court had before it the written motions

> and supporting briefs submitted by Rogers's counsel.

Rogers, 282 Ga. at 661.[3]

This Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *See, e.g., Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983). Therefore, as the decision by the Georgia Supreme Court clearly rests upon state law, *Lynd v. State*, 262 Ga. 58, 414 S.E.2d 5 (1992), this Court should deny certiorari to review a state court judgment resting on an adequate and independent state law ground.

B. The Georgia Supreme Court Properly Conducted A Fact Specific Application Of Settled Legal Principles.

Should this Court decide the Georgia Supreme Court's decision was not based solely upon state grounds, this Court should still decline to grant certiorari to review the decision of the Georgia Supreme Court as its fact specific decision does not

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[3] Furthermore, the trial attorney in question was not death penalty qualified under Georgia's Unified Appeal Procedure. (R. 178).

conflict with the holding of this Court in *Gonzalez-Lopez*.

The facts of *Gonzalez-Lopez* are substantially different than the facts in Petitioner's case. Mr. Gonzalez hired a private attorney, Mr. Joseph Low, from California to represent him in federal court in Missouri on criminal charges, and the Magistrate Judge eventually denied Mr. Low's *pro hac vice* request for admission based upon an erroneous ruling that Mr. Low had violated a court rule. *Gonzalez-Lopez*, 126 S. Ct. at 2560. However, in Petitioner's case, the attorney in question continued to represent Petitioner after the pre-trial motions. Furthermore, the attorneys the trial court allowed to orally argue during the pre-trial motions hearing never stated they were not prepared to go forward with the litigation of the motion, and in fact went on for many pages, including calling witnesses, in petitioning the trial court to grant their motion. (T. 758-831).

Petitioner's mere disagreement with the factual resolution of his claims by the trial court and the Georgia Supreme Court, neither lower court violating the applicable precedent of this Court, does not present a question worthy of this Court's exercise of its certiorari jurisdiction. As this claim turns solely on a review and assessment of the specific set of facts in Petitioner's case, this Court should decline to grant certiorari review.

III. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI AS THIS CLAIM IS NOT PROPERLY BEFORE THIS COURT AS THE GEORGIA SUPREME COURT FOUND THIS CLAIM WAS WAIVED IN THE TRIAL COURT.

Petitioner asserts that the Georgia Supreme Court erroneously dismissed his claim that the trial court improperly tried his mental retardation trial as a civil, instead of a criminal, proceeding. The record showed, however, that Petitioner waived his objection to the trial court's decision regarding this issue. Therefore, this claim is not properly before this Court for review.

Petitioner enumerates two errors with the civil procedure in which his trial was conducted: 1) Petitioner was not given the correct number of peremptory challenges; and, 2) Petitioner was made to strike first during jury selection and was denied his right to exercise the final jury strike. The Georgia Supreme Court found each of these issues was waived by Petitioner at trial.

A. The Georgia Supreme Court Found This Claim Was Waived In The Trial Court.

At trial Petitioner did not object to receiving fifteen peremptory challenges and in fact, counsel for Petitioner *informed* the State that it had fifteen challenges. (T. 713). Accordingly, the Georgia Supreme

Court found the following regarding Petitioner's claim that he was denied the correct number of peremptory challenges to the jury pool:

> Any error in the application of OCGA § 15-12-165 (State and defendant in death penalty cases each allowed 15 peremptory challenges) to Rogers's trial was invited by defense counsel and, as such, is not grounds for reversal. *Pye* [*v. State*], supra, 269 Ga. at 787 (14). See also *Madison v. State*, 281 Ga. 640, 642 (2) (c) (641 SE2d 789) (2007) (defendant not deprived of protected right by retroactive application of OCGA § 15-12-165, reducing number of peremptory strikes, as peremptory strikes are procedural and not substantive in nature).

Rogers, 282 Ga. at 662.

Similarly, Petitioner acquiesced to the trial court's ruling that Petitioner must accept or reject each juror prior to the State. (T. 712-714). On this point, the Georgia Supreme Court found the following:

> Rogers contends that the trial court erred by conducting his mental retardation trial as a civil, rather than a criminal, proceeding. See generally *Stephens v. State*, 270 Ga. 354, 356 (2) (509 SE2d 605) (1998) (*Fleming* trial is deemed part of guilt/innocence phase). Specifically, Rogers argues that the trial court erred by failing to follow OCGA § 15-12-166, which provides that in criminal cases the State must accept or reject each potential

> juror before the defendant is required to do so. However, our review of the record establishes that Rogers repeatedly reiterated that his *Fleming* trial should be conducted as a civil proceeding, that the trial court denied Rogers's request regarding the order of juror questioning based on these representations by counsel, and that Rogers then acquiesced to the trial court's ruling. Under these circumstances, we find that Rogers has waived any objection to the trial court conducting his *Fleming* trial as a civil proceeding and to the order of the exercise of his peremptory challenges. See *Pye v. State*, 269 Ga. 779, 787 (14) (505 SE2d 4) (1998) (party cannot ignore perceived error at trial, take chance on favorable verdict, and then complain on appeal).

Id. (*See* footnote 2).

This Court has held that when Petitioner fails to properly raise an issue at trial this Court will decline to grant review of this issue. *See Satterwhite v. Texas*, 486 U.S. 249, 259, 108 S. Ct. 1792 (1988); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Jacobi v. Alabama*, 187 U.S. 133, 136, 23 S. Ct. 48 (1902). Therefore, as Petitioner waived his objections to trying his case by civil procedure, he presents no issue worthy of review by this Court in the instant petition for a writ of certiorari.

B. The Georgia Supreme Court's Decision Rests On An Independent And Adequate State Ground.

Should this Court deem this issue not to be waived, this Court should also decline review as the Georgia Supreme Court's ruling on this claim is predicated upon adequate and independent state law grounds. The Georgia Supreme Court based its decision upon its holding in *Pye v. State*, 269 Ga. 779, 505 S.E.2d 4 (1998), that if a party chooses not to object at trial he cannot later complain and expect the court to find error.[4] As this Court has held on numerous occasions, a state court judgment which rests on independent and adequate state grounds presents no federal question for adjudication by this Court. *See e.g.*, *Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983). Thus, as the decision of the Georgia Supreme Court rests on adequate and independent state law grounds, this Court should deny certiorari review.

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[4] Further, the law upon which Petitioner states the trial court committed error is also state law, O.C.G.A. § 15-12-165 and 15-12-166.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

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CAPITAL CASE

In The
Supreme Court of the United States

JAMES RANDALL ROGERS,
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v.

STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

PETITION FOR REHEARING

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2008 WL 1699280 (Ohio April 9, 2008) 2-5

United States v. Gonzales-Lopez,
548 U.S. 140, 126 S. Ct. 2557 (2006) 1

PETITION FOR REHEARING

Petitioner JAMES R. ROGERS, based on intervening circumstances of substantial or controlling effect and a substantial ground not previously presented, respectfully requests that this Court vacate its denial of his Petition for Writ of Certiorari as entered on April 14, 2008, and grant certiorari.

On February 4, 2008, Mr. Rogers filed a petition for a writ of certiorari asking this Court to examine the legal determinations by Georgia state courts relating to mental retardation and the Eighth Amendment. Specifically, Mr. Rogers presented the following questions:

(1) Whether the execution of Petitioner Rogers, who suffers from severe organic brain damage and significantly sub-average intelligence that interferes with his mental capacity and ability to function, who manifested impairments in adaptive behavior similar to those found in mentally retarded individuals during his development, and who was just 19 years and one month old at the time of the crime, would violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment right to equal protection.

(2) Whether the Georgia trial court denied Petitioner Rogers assistance of counsel in violation of *United States v.*

Gonzales-Lopez, 548 U.S. 140, 126 S. Ct. 2557 (2006), and the Sixth Amendment when it refused to permit Rogers' chosen, pro bono counsel - the only counsel who was prepared - to argue critical pre-trial motions at his mental retardation hearing.

(3) Whether the Georgia trial court's use of civil trial procedures at Petitioner Rogers' mental retardation hearing, instead of the criminal procedures requisite to the continuation of Rogers' criminal trial, violated Rogers' rights to due process and equal protection.

Mr. Rogers respectfully requests that this Court rehear his case, as this Court denied his petition without the benefit of argument based upon the recent decision in *State v. White*, No. 2006-0295, 2008 WL 1699280 (Ohio April 9, 2008).

The petitioner in that matter, Clifton White III, was a prisoner under sentence of death for aggravated murder who, following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), filed a successor petition for post-conviction relief asserting that the Eighth Amendment prohibited his execution because he was mentally retarded. *White*, 2008 WL 1699280 at *1. Experts for Mr. White and the state jointly conducted tests to determine whether he was mentally retarded, including the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), a standard IQ test; the Wide Range Achievement Test, Third Edition ("WRAT-III"), which measures academic achievement;

and the Scales of Independent Behavior-Revised ("SIB-R"), which measures adaptive skills. *Id.* at *2. While the results of the WAIS-III and WRAT-III established Mr. White's significantly sub-average intellectual functioning, *id.*, and the SIB-R indicated that Mr. White suffered from significant limitations in adaptive skills, *Id.* at *3-4, the trial court ultimately denied Mr. White's petition for post-conviction relief, ruling, *inter alia*, that he had failed to establish "significant limitations in two or more adaptive skills . . . ." *Id.* at *5.[1]

In so concluding, the trial court disregarded the results of this expert testing in favor of anecdotal lay testimony suggesting that Mr. White had no adaptive behavior deficits. The trial court relied heavily upon the testimony of Heather Kawczk, Mr. White's former girlfriend, and whose mother he had allegedly killed, to the effect that Mr. White "was popular in school and participated in activities with others. She testified that he worked, rented an apartment, bought a truck, and helped her when she bought a car. She also testified that White could cook, drive, and play games that required coordination." *Id.* at *4.

While acknowledging the possibility of Ms. Kawczk's bias, the trial court found that Ms. Kawczk's testimony provided "credible anecdotal evidence . . . to demonstrate a level of performance perceived by [White's] closest companion to be reasonably

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[1] The trial court also erroneously concluded that Mr. White had not proven the onset of sub-average intellectual functioning and adaptive behavior deficits before the age of 18.

sophisticated, other than retarded, and fairly well mainstream." *Id.* at *5. The trial court found the evidence of mental retardation further wanting in that "not a single anecdote has been supplied to the experts, and restated to this court by anyone, of any incongruent behavior – something bizarre, something out of the ordinary – anecdotes which demonstrate that his family and peers considered him significantly deficient in adaptive behavior skills." *Id.*

On appeal, the Supreme Court of Ohio reversed, holding that the trial court had abused its discretion by refusing to find that Mr. White had established retardation by a preponderance of the evidence. *Id.* at *7. While noting that the record lent no support to the trial court's apparent belief that the SIB-R's use of information from Mr. White and his family compromised its validity, the Court also criticized the trial court's interpretation of Ms. Kawczk's testimony as evidence that Mr. White had no adaptive limitations. "According to the undisputed testimony of the expert witnesses in this case," the Court noted, "the facts stated in Kawczk's testimony *are in no way inconsistent with mild mental retardation*." *Id.* at *9 (emphasis added). As the Court summarized, "[t]he mentally retarded are not necessarily devoid of all adaptive skills. Indeed, they may look relatively normal in some areas and have certain significant limitations in other areas. Mildly retarded persons can play sports, write, hold jobs, and drive." *Id.* (Internal quotations omitted.) Indeed, the Court observed, the expert testimony stated that "in determining whether a person is mentally retarded, one must focus on those adaptive skills the person *lacks*, not on those he possesses." *Id.* (Emphasis

added.) The Court accordingly held that the fact that Mr. White had a driver's license and some aptitude with video games had no clear relevance to the question of his mental retardation. *Id.* The Court further criticized the trial court's emphasis on the fact that Mr. White's family and peers did not perceive his lack of adaptive behavior skills, as laymen cannot easily recognize mild mental retardation, and its focus on whether Mr. White had exhibited behavior that was "bizarre" or "out of the ordinary," when there was no evidence that "bizarre" behavior "is a necessary attribute of the mentally retarded." *Id.* Holding that individuals suffering from mental retardation "may look relatively normal in some areas and have . . . significant limitations in other areas," the Supreme Court concluded that "the impressions of White's peers as relayed by Kawczk lend no support to the findings of the trial court." *Id.* The Supreme Court accordingly concluded the trial court "abused its discretion when it determined that White had failed to prove the existence of significant adaptive-skills limitations." *Id.*

In light of this analysis, Mr. Rogers respectfully submits that this Court should revisit the state courts' determinations that Mr. Rogers does not suffer from mental retardation. In holding that Mr. Rogers failed to prove his mental retardation, both his jury and the Supreme Court of Georgia relied upon evidence that Mr. Rogers "checks out prison library books on a regular basis and is able to use the computer." *Rogers v. State*, 282 Ga. 659, 660, 653 S.E.2d 31, 35 (Ga. 2007). Such evidence, which has no clear relevance to the question of whether Mr. Rogers is mentally retarded, was clearly interpreted as rebutting evidence of adaptive behavior deficits. As the decision in *White*

makes clear, the state courts' analysis should properly focus on those areas in which Mr. Rogers manifests deficits, not areas in which his deficits are less plain.

For the reasons set forth in the original petition for writ of certiorari and in light of the new decision in *White*, this Court should now grant certiorari to hear Petitioner's case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44 of this Court, counsel for Petitioner certifies that the issue presented in this Petition for Rehearing of the Denial of Petition for Writ of Certiorari is limited to intervening circumstances of a substantial or controlling effect and concerns a substantial legal ground not previously presented to this Court. Counsel further certifies that because this issue raises an important question of constitutional jurisprudence, it is presented in good faith and not for purposes of delay.

Respectfully submitted,

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